From: Bailey, Kate (CIV)
To: "Freedman, John A."; Federighi, Carol (CIV); Coyle, Garrett (CIV); Kopplin, Rebecca M. (CIV); Halainen, Daniel J. (CIV); Tomlinson, Martin M. (CIV); Ehrlich, Stephen (CIV)
Cc: SBrannon@aclu.org; PGrossman@nyclu.org; "Colangelo, Matthew"; Bauer, Andrew; Gersch, David P.; Grossi, Peter T.; Weiner, David J.; Young, Dylan Scot; Kelly, Caroline; "Saini, Ajay"; "Goldstein, Elena"; DHo@aclu.org
Subject: RE: State of New York v. Department of Commerce, S.D.N.Y 18-CV-2921; NYIC v. Department of Commerce, S.D.N.Y. 18-CV-5025: Meet & Confer Follow Up & Other Matters
Date: Monday, September 10, 2018 6:48:00 PM
Attachments: Communication & Partnership Program SOW & Orders.zip
Reingold - CBAMS documents.zip
Velkoff Emails & Proposal.zip

Mr. Freedman—

Your email below again misrepresents my statements in our most recent meet and confer. I strive for transparency in representing the government's position and I am precise with my language. Although we believe that all parties benefit from prompt and frank discussion over points of disagreement, we are concerned that your follow-up emails have mischaracterized my statements; please be advised that, should this practice continue, we will be forced to limit further communications to writing.

- Critically, **I did not "advise[] that there was potentially another 25 gigabytes of records that should have been produced as part of the Administrative Record".** Plaintiffs filed a motion to compel and, in an effort to resolve the disagreement without the need for court intervention, we agreed **to perform the searches requested in your motion.** We did not adopt your characterization that these materials are part of the "supplemented record," but rather agreed to perform additional searches to negate a dispute.

- As stated in my email Friday **and confirmed in the email from Dale Ho attached to that email,** Plaintiffs offered to propose narrowing terms to limit the 25+ GB of material to a more manageable number. Thus, your continued insistence that we agreed to "propose alternate search terms that would reduce production burden on []our client" and your implied assertion that we were somehow negligent in not providing a proposal to Plaintiffs is inaccurate.

- I stated clearly on our meet and confer that Defendants had gathered more than 25 GB of material **responsive to Plaintiffs' motion to compel.** That motion asked the Court to compel Defendants to: (1) add the additional search terms Plaintiffs speculate will reveal "animus," such as "aliens," "illegals," "illegal aliens," and "undocumented"; (2) add search terms "reasonably calculated to identify memorialization of the pre-December 2017 engagement" of DOJ or DHS, including Steve Bannon, Mark Neumann, Gene Hamilton, James McHenry, Danielle Cutrona, and Mary Blanche Hanckey; and add additional custodians, including Eric Branstad, Aaron Willard, and Brian Lenihan. Defendants have gathered all of the materials requested in your motion and, out of an abundance of caution, included two additional custodians: Sahra Park-Su and David Langdon. **Nowhere in your motion did you request the Court compel Defendants to search additional terms or to include additional custodians beyond those listed here, and we find disingenuous your suggestion below that you expected us to collect additional materials beyond those on which you based your**

motion.

- Relatedly, we anticipated from Mr. Ho's statement that Plaintiffs were "conferring internally about *narrowing* terms to facilitate production of documents" that your proposal would be calculated to cull down the large volume of materials gathered in response to your motion. Instead your proposal adds terms not mentioned in your motion (immigrants, noncitizen, non-citizen, Democrat, Zadrozny, and Sherk), and additional custodians not referenced therein (Velkoff and Raglin). As I made clear on our recent call, we gathered the materials responsive to your motion (and spent more than a week doing so) and do not believe we are falling short of our obligations by declining to respond to your most recently added demands.

- And as we have noted repeatedly, unfortunately we have neither the information-technology resources nor the staff that would be required to meet your demands. Our client has spent slightly more than the last week gathering the tranche of materials potentially responsive to your motion to compel and transferring that large volume of materials to our database for processing. That transfer is still completing now, **which means we have not yet been able to begin running any searches and will certainly not be able to do so today.** We plan to begin reviewing and processing the materials as soon as they are fully loaded in our database.

- We will run the searches you've proposed, **within the materials gathered as potentially responsive to your motion**, with one specific change: As I have informed you, the agency believes "Bannon" generates a large volume of nonresponsive material due to his interactions with the agency on unrelated matters. Accordingly, we will run: (Bannon and (census or apportionment or enumerate! or districting or counting)). Aside from this limitation, we will run the searches you requested against the 25GB+ collected and make rolling productions of nonprivileged, responsive material. We will not "provide regular reports on []our clients' progress."

Regarding Mr. Gore's documents, we advised you several weeks ago that we *were* prioritizing his documents but, due to the volume of potentially responsive materials and the multiple layers of review required, it would take some time to complete production of those materials. We advised that production of his materials would not be possible within the timeframe Plaintiffs wished to take his deposition. Ms. Goldstein asked us to provide dates nonetheless and acknowledged that it would be up to Plaintiffs whether to schedule the deposition beforehand or wait until production was complete. While the Second Circuit's administrative stay has given a reprieve, please note that it will take us some time to complete processing of Mr. Gore's documents and, should the stay ultimately be lifted and Plaintiffs choose to proceed with his deposition before we can produce all of his documents, he will not be made available a second time.

We are somewhat confused by the questions you've raised regarding DOJ emails produced without attachments. You are correct that certain emails have been withheld as privileged, as reflected in our privilege log, but we have produced the underlying emails, where possible, in the interest of transparency. For instance, DOJ 2738 is an email produced with redactions, and its attachment, slipsheeted as DOJ 2739, is a draft of the Gary letter withheld as deliberative. Our assertions of privilege are all properly reflected in our log, and we have been judicious in our assertions of privilege and produced the underlying email where appropriate. There is nothing unusual or improper in that practice. We will otherwise get back to you later this week regarding the specific assertions of privilege you have challenged from our DOJ productions.

Finally, the documents you have requested that were referenced in Dr. Abowd's deposition—and the subject of your seventh motion to compel, filed today, are attached. We received them only today and have not yet been able to process and Bates-stamp them, but will take care of that later this week.

Best,

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Subject: State of New York v. Department of Commerce, S.D.N.Y 18-CV-2921; NYIC v. Department of Commerce, S.D.N.Y. 18-CV-5025: Meet & Confer Follow Up & Other Matters

Counsel --

Your note from Friday evening did not address several topics we asked you to address. There are also several other issues:

1. Mr. Gore's deposition: The DOJ production for materials from Mr. Gore (including his non-

governmental accounts) should be completed prior to the start of Mr. Gore's deposition. We have been advising you to prioritize production of these materials for weeks. Please advise on status and when we will receive these materials. In addition, please advise on the status of the questions we have raised about your deliberative process assertions and when any withheld materials will be produced. Additionally, please advise by close of business today as to the attendees for the deposition.

2. Title 13: In your August 28 email, you advised that certain documents were being withheld (including 10382 and 10385) because they contained "2017 ACS data that are pre-release and cannot be released publicly until September 13." These documents (and any others impacted by similar issues) should be produced no later than Thursday.

3. Supplementation of the Administrative Record: Your email makes multiple misstatements about assurances you provided before we agreed to ask the Court to hold the fifth motion to compel in abeyance. During that call, you advised that there was potentially another 25 gigabytes of records that should have been produced as part of the Administrative Record, based on the supplemental search terms and custodians we suggested. As you know, Judge Furman's July 5 and July 23 order were clear that the Administrative Record was to be complete by July 26 and that no further extensions would be granted. Your clients' failure, in light of this order, to search for such custodians as Eric Branstad, Aaron Willard, or key personnel who assisted Dr. Abowd is inexplicable, as were the unduly narrow terms used to search for responsive records in the first instance. And your insistence on using the incorrect spelling for search terms, such as Mark Neuman's name (which he used to sign emails, AR 3709), does not inspire confidence that your clients can competently conduct searches.

During the call, we suggested that you propose alternate search terms that would reduce production burden on your client. Since you have refused to do so and your client seems unwilling to otherwise comply with Judge Furman's orders regarding completion of the record, we have attached the searches that should be run. If you believe that any specific search constitutes a burden, we would be willing to consider further refinements if you identify the search term and provide a custodian-by-custodian breakdown of the number of documents generated by each search term.

Because your client has already gathered materials from the custodians, we expect that the narrowed searches will be run today and that you will raise any issues of burden immediately. We also expect supplemental Administrative Record productions to be made on a regular basis and that you will provide regular reports on your clients' progress.

4. We are at impasse on the other issues discussed during Wednesday's meet and confer and raised on Friday's email and will be raising these issues with the Court.

Best regards,

John

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